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NO. 88-680

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CLIFFORD Y.C. LAI and VICTORIA L. LAI,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU,
a municipal corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS LAI'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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I. PETITIONERS LAI'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

A. Respondent City and County of Honolulu's Brief establishes that no record or factual basis exists for the jurisdictional facts it argues to this Court and the Ninth Circuit panel, which claims are contradicted by the established caselaw and the record in this case.

The two issues raised by Respondent in its Brief of Respondent City and County of Honolulu in Opposition to Petition for Writ of Certiorari are: (a) whether Petitioners LAI "skirted the administrative process" by not seeking a "variance", and; (b) did Petitioners LAI waive their rights to seek compensation by not attempting to proceed with an uneconomical 51-unit development and then seeking damages for their losses. Both of these issues are refuted by the trial court's Findings of Fact and Conclusions of Law after Appeal and Remand. Both of these issues are specious, which accounts for why Respondent is unable to refer this Court to any caselaw, administrative regulations, rejected findings below, or trial testimony. Had the Ninth Circuit panel reviewed these same findings, rather than engage in activist judicial legislation seeking to broaden this Court's holdings in both .*Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194, 105 S.Ct. 3108, 3121, 87 L.Ed.2d 126, 144 (1985)and *Nollan v. California Coastal Commission* ___U.S.___, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987);, it would have realized this case was ripe for substantive review. Since this Court's decisions in those two cases, Respondent City has utilized those opinions to retroactively argue facts and remedies which didn't exist in 1978, and which don't exist today.

District Judge King, far more familiar with both the facts and the purported existence of administrative remedies, ruled:

> Plaintiffs LAI have been denied any and all economic use of that portion of the airspace over the thirty thousand square feet of ground space, in that the Ordinances and their legislative history clearly indicate that

> the only stated justification and rationale of such stringent height regulations would be thwarted if Plaintiffs were allowed to use that portion of their airspace above the twenty five foot level in any manner.

Appendix C of Petition, FF. 13, pp.13a-14a.

> There can be no administrative action which would lessen the harsh impacts of the regulation in the instant case, as Plaintiffs have been denied a Certificate of Appropriateness under Ordinance 4488 based purely on the height of the project; no other procedures are available to Plaintiffs, as the regulation makes no provision for any discretion or administrative action. .

Appendix C of Petition, FF. 23, p. 23a.

Despite these findings, which were not challenged on appeal, Respondent claimed and continues to claim that Petitioners LAI "chose to skirt the administrative process, choosing instead to bring a premature action without giving the City the opportunity *Williamson County* requires to reach an agreement and make a final decision." Brief for Respondent at p.10. These findings are well supported by the record, but the errors in the Ninth Circuit panel opinion offer quality evidence that they failed to read either.

Respondent speaks in terms of Petitioners LAI'S duty to seek "alternative development approvals (sic)" and "plans for development" as if the property at issue were more than a mere 30,000 square foot parcel which required only a single permit for development. Respondent CITY seeks to complicate the issue by impliedly claim-

ing that it, as the "local government", has been denied "the opportunity to decide how it will apply those land use controls to the petitioner." Brief for Respondent CITY at p.8. In reality, no such discretion exists whereby Respondent CITY would be allowed to alter or ameliorate the application of the challenged ordinances to Petitioners LAIS' property, and the lack of such discretion makes the denial of the Certificate of Appropriateness totally and unalterably "final" for purposes of this litigation.

The question which faced Respondent CITY was very simple, to wit: will we allow Petitioner LAI'S development to exceed twenty-five feet, thus projecting into the view corridor it had asserted for itself, or not. This answer to this question does not require a complex development submission, but only a political decision by Respondent CITY to abandon its taking and pay compensation. Even if Respondent CITY desired to alter the application of the singular land use control at issue herein, it has no authority to do so. Respondent CITY's purported gesture is of a remedy other than damages that should have been offered in 1978, not 1988; as Judge King found, money damages are the only remedy.

This Court should not be swayed by the purported remedies which Respondent was unable to offer during eight years of trial court proceedings and which have materialized only after litigation imposed liability. Any such remedy will evaporate into mist the instant this Court denies Petitioner LAIS' Petition, never to be acknowledged again. The purported "variance" would certainly raise the wrath of those political forces which caused Ordinances 4488 and 78-89 to be enacted in the first place, including those who already own and/or occupy high-rise developments who sought to protect their views and increase their own property values at the expense of a few people such as Petitioners LAI who were unfortunate enough to rely upon the zoning granted by Respondent CITY and pursue similar investments.

Ordinance 4488 was strictly drafted to prevent exactly what Respondent CITY now states could occur; the granting of "variances" through any other process than a vote of the entire City Council as a Certificate of Appropriateness would require. The drafters of Ordinance 4488, well aware of the existence of cash-and-

carry politics in the area of zoning and planning, certainly did not intend to allow three appointed members of the Board of Zoning Appeals to have authority to overrule the elected members of the City Council. Ordinance 4488, other than allowing extremely minor encroachments into the view corridor, provided:

> Other exceptions not to exceed the height regulations contained in any underlying zoning district may be considered in accordance with Section 21-1205. The City Council shall set forth findings of fact that the proposed construction would not diminish any existing public views of Punchbowl from the view corridor defined by the district boundary, or is necessary to achieve some public objective of relatively equal or greater importance than listed herein. Such findings of fact shall include the provision of information which provides a basis for the objective in terms of a public need or problem, other reasonable alternatives to achieve the objective and an appropriate analysis of the alternatives which indicate that the proposed construction is the most beneficial to the public's interest.

Ordinance 4488, Sec. A(2)(b); Appendix E to Petition at p.31(a). With these restrictions Respondent CITY enacted to limit its own authority, it would have been futile for Petitioners LAIS to make an "attempt to alter their initial development proposal" as Respondent CITY faults them for failing to do. Brief for Respondent at p.9.

Basic rules of statutory construction dictate the specific provisions of a height ordinance, containing a higher degree of

control and requiring a higher degree of proof to overcome in order to grant a non-conforming Certificate of Appropriateness. Respondent CITY failed to discuss the Certificate if Appropriateness generally or the necessity that it's City Council enter such findings specifically, relying on vague generalizations relating to "variances" instead. Respondent CITY'S references to this variance procedure are mere red herrings seeking to confuse this Court as to the extent of their authority and the allowable variations allowed by the variance process; unfortunately, with no factual record containing this claim, and thus the inability of the factual record to demonstrate such sophistic arguments, the Ninth Circuit panel elevated form over substance in reversing the judgment for Petitioners LAI and accepted this argument hook, line, and sinker, with no analysis whatsoever.

Even the alleged variance discussed by Respondent CITY is applicable to projects which have already been denied a Certificate of Appropriateness, assuming *arguendo* that such procedure is not eliminated by the far more specific Ordinance 4488; itself, a further analysis of the applicable law of variances establishes that the highly-restricted grant of authority contained in the Honolulu City Charter would not allow Respondent CITY any discretion to consider or grant such a variance. Under the City Charter, variances may be granted only under certain very limited situations and would grant limited alterations, and are thus not applicable to the factual record in this case. These restrictions explain why Respondent CITY failed to allude to or litigate this issue below, even when given an opportunity to do so.

Section 6-909(b) of the Revised Charter of the City and County of Honolulu, provides in pertinent part:

> (b) Hear and determine petitions for varying the application of the zoning ordinance with respect to a specific parcel of land and may grant such a variance upon the ground on unnecessary hardship if the record shows that (1) the applicant would be deprived of the reasonable use of such land or building if it were used

> only for the purpose allowed in that zone; (2) the request of the applicant is due to unique circumstances and not the general conditions in the neighborhood, so that the reasonableness of the neighborhood zoning is not drawn into question; and (3) the use sought to be authorized by the variance will not alter the essential nature of the locality nor be contrary to the intent and purpose of the zoning ordinance.
>
> The board shall specify the particular evidence which supports the granting of a variance.

Petition, Appendix F of Petition at 38a. The criteria required to obtain a variance do not exist in the instant case, as there exists no rationale reason to believe that a variance could be utilized to alter the *use* rather than the height of the project, that *the circumstances afflicting Petitioners LAI were unique, that the use sought to be authorized would not alter the essential nature of the locality nor be contrary to the intent and purpose of the zoning ordinance.* Petitioners LAI were in compliance with all underlying zoning for apartment use with a maximum 350 foot height limit, and cannot alter that use by definition. Additionally, the Ordinances 4488 and 78-89 are applicable to their property and neighboring properties, and the general area; under this procedure, Petitioners LAI cannot challenge the height limits imposed on the neighborhood even if Ordinance 4488is deemed as a zoning ordinance.

The Honolulu Charter thus provides a specious remedy at best even under the best of circumstances, and the specific provision relied upon by Respondent CITY has been given a highly restrictive interpretation by the Hawaii Supreme Court. In *McPherson v. Zoning Board of Appeals*, 67 Haw. 603, 699 P.2d 26 (1985), Respondent CITY failed to sustain the correctness of a decision of the Zoning Board of Appeals granting a variance. The Hawaii Supreme Court reversed the granting of a variance as beyond the powers of the Board, and observed:

> One of the problems in this case is that the Charter limits the power of the Board to grant variances to cases where a rather narrow and somewhat technical set of facts must be established.

67 Haw. at 606, 699 P.2d at 29. In view of the restricted scope of relief to alter a use [as opposed to the taking of airspace, Petitioners LAI have no remedy in the Zoning Board of Appeals.

Respondent CITY did not elicit any testimony or present any argument in the trial court which even hinted at the availability of such a variance, and it continues that silence in this Court. Petitioners contend that such claims are mere hot air made only on appeal of this case after a loss in the trial, in the vague hope that this Court will accept this claim as a substitute for their lack of evidence or arguments in the trial court.

B. Respondent City and County of Honolulu misconstrues to this Court the evidence in the District Court relating to the hypothetical 51-unit development.

Respondent CITY also implies in its Brief that no taking occurred in the instant case because of the evidence presented below that a 51-unit residential development would be permitted, and that Petitioners LAI are to be further faulted for not submitting a proposal for such a development. The evidence was not an"admission" by Petitioners LAI, but was in fact the basis for one prong of the economically-viable use evidence in the District Court. Respondent CITY failed to present any evidence below of what type of development could be economical under the height limitations, so Petitioners LAI presented these facts to give the trial Court the best-case picture of the effects of Ordinances 4488 and 78-89.

This evidence, introduced through expert testimony of Petitioners LAI'S appraiser, established that the costs of construction and the nature of the low-rise mandated by the regulations would prevent

any new construction from being an economically-viable alternative to continuing the existing use.

As found by the trial court, such a development was not reasonable, particularly when the same would require extensive capital for very uncertainly likelihood of any return on investment. Judge King found:

> 11. Due to Ordnance 4488 and the later Ordinance 78-89, Plaintiffs LAI have been unable to develop their property as planned or in any economically reasonable manner and are left with an old, dilapidated low-rise development of doubtful value for development.
>
> 12. A density study for the property was prepared by Gerald H.W. Lum, AIA. The study considered the subject's development potential prior to August 4, 1975, and under current requirements. It was estimated that prior to August 4, 1975, a likely development would be 112 units, with an aggregate floor area of 67,536 square feet and a total height of 80 feet. Under Ordinance 4488 and its successor 78-89, it was estimated that 51 units with an aggregate floor area of 30,900 feet with the height restriction would be achievable.

Appendix C of Petition; FF. 11-12, p. 13a. Again, these findings are not challenged but are merely ignored by Respondent CITY. Petitioners LAI'S evidence thus does not support any argument that they have chosen to bypass any rational development of their property involving new construction. As the property is located next to an elevated

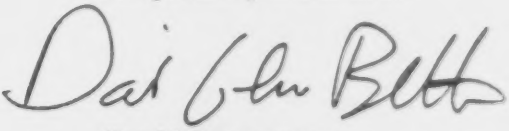
portion of the H-1 freeway, it is uniquely unsuited to any low-rise development and, conversely, it was identified by Respondent CITY, through decision to grant high-rise apartment zoning, as particularly well-suited to high-rise development.

Respondent CITY contends both that no taking existed, but that if one did, it is premature for the District Court to have awarded monetary damages. This Court is invited to review the detailed findings of Judge King, and to consider whether Respondent CITY should, even if this Court considers the ripeness of this case not totally established by these findings, be required on remand to litigate the existence of the purported "variance" and reasonable construction alternatives before Judge King before the drastic step of dismissal.

II. CONCLUSION

The Ninth Circuit's decision creates an untenable state of confusion regarding the nature of Hawaii law; contrary to the established law of this Court and other circuits, the Ninth Circuit panel decision allows municipalities in Hawaii to avoid liability and monetary judgments on the faint hope of an administrative remedy. In the instant case the Ninth Circuit panel grievously erred, when it allowed buzzwords to substitute to correct the excess and error of the decision below, and to adjudicate the required specificity of any state administrative remedy in the Ninth and other circuits, this Court should GRANT this Petition for Writ of Certiorari.

Respectfully submitted,



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